

91-851

No.

Supreme Court, U.S.  
FILED

DEC 2 1991

OFFICE OF THE CLERK

---

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

---

ROSEMARY M. MEDLEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

---

*PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS*

---

**PETITION FOR A WRIT OF CERTIORARI**

---

MICHAEL D. BURT  
*Captain, Air Force Legal  
Services Agency  
United States Air Force  
AFLSA/JAJD  
Bldg 5683  
Bolling AFB, DC 20332-6128  
(202) 767-1562  
Counsel of Record*

JEFFREY R. OWENS  
*Colonel, Air Force Legal  
Services Agency  
United States Air Force  
Counsel for Petitioner*

December 1991

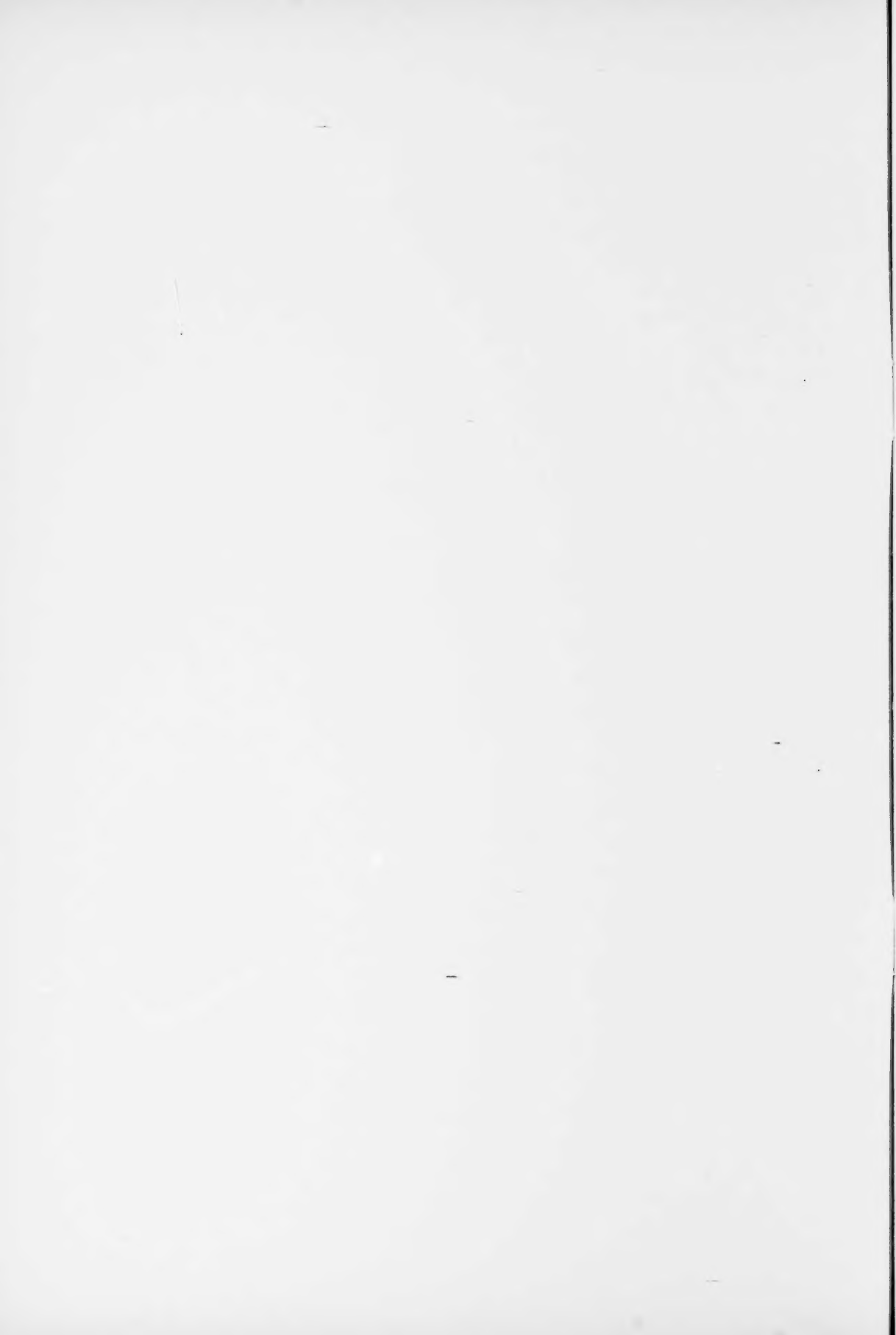
---

---



### **QUESTION PRESENTED**

Whether petitioner's right to avoid compulsory self-incrimination under the Fifth Amendment to the United States Constitution was violated by her conviction for failing to report to military authorities the drug use of those with whom she had used drugs.



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	2
Constitutional Provision Involved .....	2
Statement of the Case .....	2
Reasons for Granting the Writ .....	3
Conclusion .....	11
Appendix A .....	1a
Appendix B .....	7a

## TABLE OF AUTHORITIES

### CASES:

#### United States Supreme Court Decisions:

<i>Albertson v. Subversive Activities Control Board</i> , 382 U.S. 70 (1965) .....	4
<i>Baltimore City Dep't of Social Services v. Bouknight</i> , 493 U.S. 549 (1990) .....	5
<i>California v. Byers</i> , 402 U.S. 424 (1971) .....	4, 5, 7
<i>Grosso v. United States</i> , 390 U.S. 62 (1968) ..	4
<i>Hoffman v. United States</i> , 341 U.S. 479 (1951) .....	4
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968) .....	4, 5
<i>Miranda v. Arizona</i> , 384 U.S. 436 (1966) ....	3

#### Federal Circuit Court of Appeals Decisions:

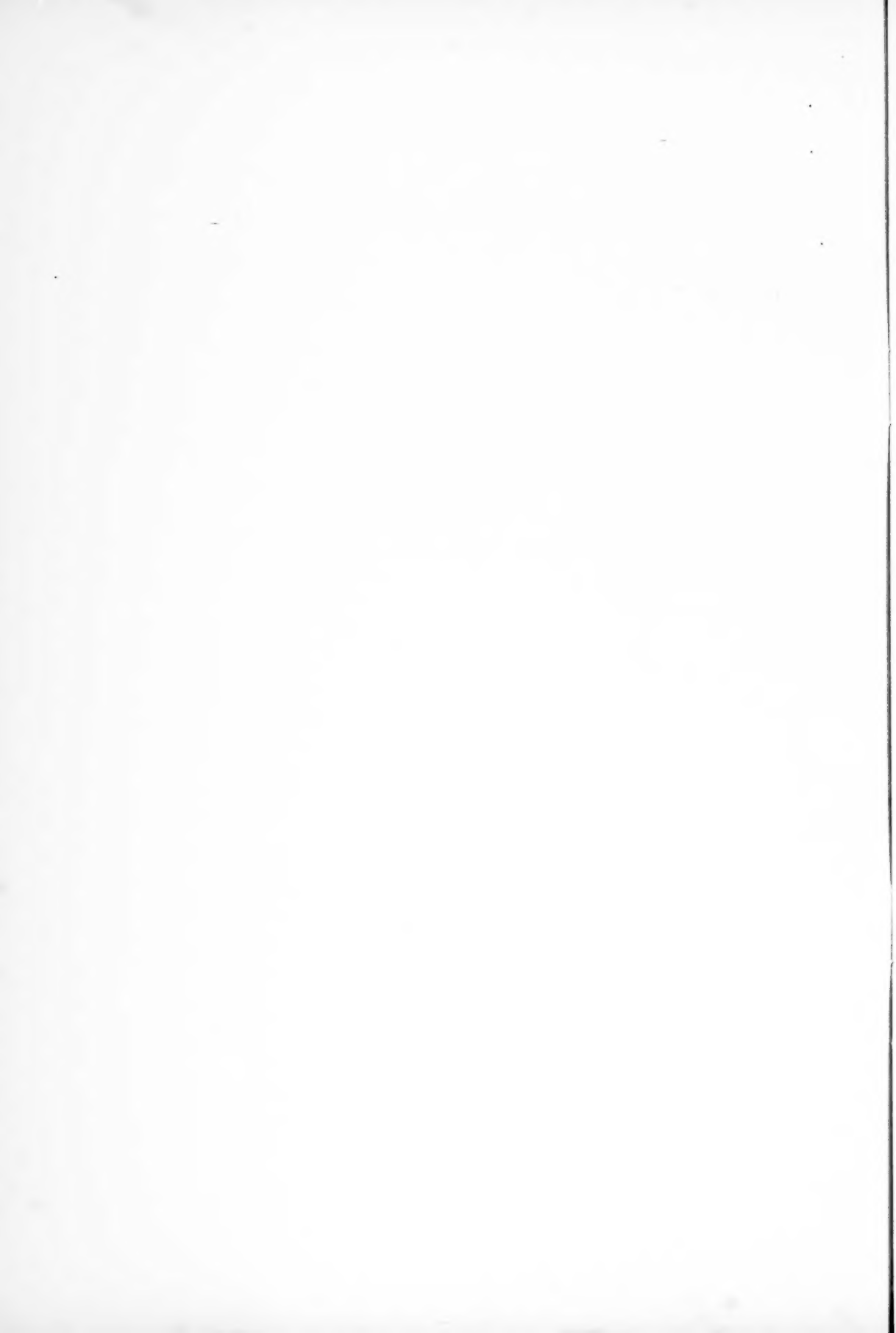
<i>United States v. Kuh</i> , 541 F.2d 672 (7th Cir. 1976) .....	4
--	---

#### United States Court of Military Appeals Decisions:

<i>United States v. Clifton</i> , 15 M.J. 26 (C.M.A. 1983) .....	3
--	---

CASES – Continued:	Page
<i>United States v. Dupree</i> , 24 M.J. 319 (C.M.A. 1987) .....	5
<i>United States v. Heyward</i> , 22 M.J. 35 (C.M.A. 1986) .....	5, 9
<i>United States v. Hoff</i> , 27 M.J. 70 (C.M.A. 1988) .....	6
<i>United States v. Lee</i> , 25 M.J. 457 (C.M.A. 1988) .....	4
<i>United States v. Medley</i> , 33 M.J. 75 (C.M.A. 1991) .....	1, 7, 8
<i>United States v. Reed</i> , 24 M.J. 80 (C.M.A. 1987) .....	5
<i>United States v. Thompson</i> , 22 M.J. 40 (C.M.A. 1986) .....	5
Courts of Military Review Decisions:	
<i>United States v. Brunton</i> , 24 M.J. 566 (N.M.C.M.R. 1987) .....	10
<i>United States v. Medley</i> , 30 M.J. 879 (A.F.C.M.R. 1990) .....	1
<i>United States v. Tyson</i> , 2 M.J. 583 (N.M.C.M.R. 1976) .....	4
State Court Authorities:	
<i>State v. Carson</i> , 262 S.E.2d 918 (S.C. 1980) ..	6
CONSTITUTIONAL PROVISIONS:	
U.S. Const., amend V .....	2, 3, 5
STATUTORY AUTHORITIES:	
10 U.S.C. § 831 (1988) .....	3
10 U.S.C. § 867(h) (Supp. 1990) .....	2
10 U.S.C. § 892 (1988) .....	1

STATUTORY AUTHORITIES – Continued:	Page
10 U.S.C. § 912(a) (1988) .....	1
28 U.S.C. § 1259(3) (1988) .....	2
MISCELLANEOUS:	
R. Perkins and R. Boyce, <i>Criminal Law</i> , 742 (3d ed. 1982) .....	8





# In the Supreme Court of the United States

OCTOBER TERM, 1991

---

No.

ROSEMARY M. MEDLEY, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

---

*PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS*

---

The petitioner, Rosemary M. Medley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Military Appeals entered in her case on September 4, 1991.

## OPINIONS BELOW

The United States Air Force Court of Military Review issued its reported decision affirming petitioner's conviction for dereliction of duty, in violation of Article 92, UCMJ, 10 U.S.C. § 892 (1988) and wrongful use of cocaine in violation of Article 112a, UCMJ, 10 U.S.C. § 912a (1988) on April 18, 1990. *United States v. Medley*, 30 M.J. 879 (A.F.C.M.R. 1990) (Appendix A). (The court also set aside a specification alleging dereliction of duty.) The decision of the United States Court of Military Appeals affirming the Air Force Court of Military Review is reported at 33 M.J. 75 (C.M.A. 1991) (Appendix B).

(1)

### **JURISDICTION**

The final order of the United States Court of Military Appeals was entered on September 4, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (1988) and 10 U.S.C. § 867(h) (Supp. 1990).

### **CONSTITUTIONAL PROVISION INVOLVED**

The Fifth Amendment of the Constitution of the United States provides in pertinent part:

No person shall . . . be compelled in any criminal case to be a witness against himself . . .

### **STATEMENT OF THE CASE**

Petitioner was convicted, contrary to her pleas, of wrongful use of cocaine (Additional Charge I) and dereliction of duty for failure to report those military members with whom she allegedly had used the drugs (Additional Charge II).

The evidence against petitioner consisted of the testimony of four military members: Technical Sergeant (TSgt) Ennis Wallace, Staff Sergeant (SSgt) Michael Banks, Airman (Amn) Sandra Fairley, and Airman Basic (AB) Andra Riles. All of these witnesses were admitted drug abusers charged with similar offenses who testified under grants of immunity that petitioner had used with them. Petitioner was apparently aware of these and other instances when this group of individuals had used illegal narcotics. She did not inform any military or law enforcement authorities of this knowledge.

The parties stipulated that Air Force Regulations impose an affirmative obligation on noncommissioned officers to disclose such knowledge.

The Air Force Court of Military Review concluded that petitioner's conviction for dereliction of that duty for failing to report the drug use of those with whom she had used drugs with respect to the times when she actually used drugs herself could not stand. The court found that requiring such a disclosure trampled petitioner's right to be free from compulsory self-incrimination. The court, however, affirmed findings of guilt for dereliction of duty relating to her failure to inform on her friends regarding times when she was present, but did not personally use drugs. The United States Court of Military Appeals affirmed the decision of the Air Force Court of Military Review.

Such additional facts as may be necessary to the disposition of this matter are contained in the reasons for granting the writ, *infra*.

#### REASONS FOR GRANTING THE WRIT

The requested Writ is appropriate in this case because the requirement that a service member report the drug abuse of those with whom that person has used drugs blatantly violates the constitutional rights of that member.

No person in a criminal case may be compelled to be a witness against himself. U.S. Const., amend. V; *Miranda v. Arizona*, 384 U.S. 436 (1966). The fundamental right of an individual to be free from compulsory self-incrimination is applicable to service members as well as civilians. See *United States v. Clifton*, 15 M.J. 26 (C.M.A. 1983). The Uniform Code of Military Justice specifically provides that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question *the answer to which may tend to incriminate him.*" Article 31(a), UCMJ, 10 U.S.C. § 831 (1988) (emphasis added).

In *Marchetti v. United States*, 390 U.S. 39 (1968), this Court held that the privilege against self-incrimination protected an individual from prosecution for failing to report to the Internal Revenue Service income derived from illegal gambling activities. See *Grosso v. United States*, 390 U.S. 62 (1968); *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); see generally *United States v. Tyson*, 2 M.J. 583 (N.M.C.M.R. 1976). This Court focused on whether the hazard of self-incrimination was “real and appreciable” and held that it was the substantiality of the risk that the disclosure would result in self-incrimination that controls the applicability of the Fifth Amendment’s protection. *Marchetti*, at 53; see *California v. Byers*, 402 U.S. 424 (1971); *Hoffman v. United States*, 341 U.S. 479 (1951). Because, as in the case at bar, Marchetti’s statements were to be made readily available to law enforcement officials, this Court concluded that the risk was so substantial as to require reversal of the conviction.

The protections of the Fifth Amendment extend, not only to statements that would in themselves support conviction, but, likewise, to those which would furnish links in the chain of evidence that could lead to prosecution, provided that the individual has reasonable cause to believe that he might thereby be convicted of a crime. *Hoffman, supra*, at 486; *United States v. Kuh*, 541 F.2d 672 (7th Cir. 1976).

Military law enforcement personnel may not use a regulatory disclosure requirement to subvert a member’s right to be free from compulsory self-incrimination or as a pretext for obtaining evidence of crimes in violation of the Fifth Amendment. *United States v. Lee*, 25 M.J. 457 (C.M.A. 1988). In *Lee*, the United States Court of Military Appeals held that military authorities could not use a “show and tell” regulation, requiring the disclosure

of all duty free goods possessed by a member in the Republic of Korea, to compel the disclosure of incriminating information otherwise protected by the Fifth Amendment and Article 31, UCMJ.

This case is dissimilar to *Baltimore City Dept. of Social Services v. Bouknight*, 493 U.S. 549 (1990), in which this Court determined that the Fifth Amendment did not protect a mother from complying with a court order, pursuant to State social services regulations, to produce the body of her infant son. (The Court expressly left open the uses to which testimonial evidence derived from Bouknight's disclosures could be put). In *Bouknight*, this Court found that the State's regulatory scheme promoted state interests unrelated to the enforcement of its criminal laws. See *California v. Byers*, *supra*. (In vigorous dissent, Justices Marshall and Brennan found that the required disclosure rode roughshod over Bouknight's constitutional right to be free from compelled self-incrimination). In the case at bar, however, petitioner was convicted of dereliction for failure to follow a regulatory directive that she reveal criminal conduct of which she was aware. As in *Marchetti*, *supra*, this case involves the failure to disclose criminal conduct of "a select group inherently suspect of criminal activities." *Marchetti*, at 57. The *Bouknight* rationale is, therefore, inapplicable.

In *United States v. Heyward*, 22 M.J. 35 (C.M.A. 1986) the Court of Military Appeals recognized that the privilege against compulsory self-incrimination may excuse a failure to report the illegal drug activity of others where the witness to drug use is culpably involved in the activity himself. See *United States v. Reed*, 24 M.J. 80 (C.M.A. 1987); *United States v. DuPree*, 24 M.J. 319 (C.M.A. 1987); *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986); U.S. Const., amend. V. The court dismissed the dereliction allegation in its entirety, despite the fact that

Heyward was involved in using drugs on only 3 of the 5 occasions that he failed to report. The court found that the members may have convicted Heyward of dereliction of duty for failing to report the same drug abuse to which he was a principal. Because such a conviction would violate Heyward's rights under the Fifth Amendment, the findings of guilty were disapproved.

In the instant case, requiring petitioner to report the drug abuse of those with whom she had used in the past would have necessarily resulted in her incriminating herself. The risk of self-incrimination was therefore very real and very appreciable. As a consequence, her conviction of dereliction of duty for failure to so report can not stand.

This case is unlike *United States v. Hoff*, 27 M.J. 70 (C.M.A. 1988), in which the United States Court of Military Appeals held that the privilege against compulsory self-incrimination did not excuse the failure to report others in whose criminal activity Hoff was involved only as an accessory after the fact. The court, in *Hoff*, arrived at its conclusion by reviewing the history of the offense of misprison of a felon and determined that the offense required more than mere silence but that additional affirmative acts underlie such prosecutions. *Hoff*, at 72; see *State v. Carson*, 262 S.E.2d 918 (S.C. 1980). Quite unlike the case at bar, Hoff was not involved in the underlying criminal conduct of those he subsequently protected. Hoff's additional "positive acts" in concealing the criminal conduct of his larcenous shipmates was determined to be separate and apart from the theft offenses that they committed. Here, however, petitioner's use of drugs was intertwined with the uses of the individuals that she was required to report.

In affirming petitioner's conviction, the Air Force Court of Military Review focused its analysis on the fact that the



findings of the trial court reflect that petitioner did not actually use drugs every time others in her company did. The court viewed petitioner's position as one only culpably involved in discreet instances, severable from other instances in which she was not so involved. The lower court stated that, while revealing the drug use of her co-actors would constitute "professional suicide", requiring that revelation did not violate petitioner's fundamental right to be free from compulsory self-incrimination.

Any hesitancy to report the drug use of these other individuals, however, was certainly not the product of petitioner's concern for her resumé. The uses of this group appear so intertwined that the entire process actually constituted an ongoing course of conduct, with each individual culpably involved at different specific times. Each discreet use was, therefore, intricately related to each other use. Because these uses were so closely related, no member could have reported the use of any of his co-actors without necessarily revealing his own involvement. Informing law enforcement agents of any aspect of this behavior would have necessarily and most certainly exposed the informant to *criminal* prosecution, not mere professional embarrassment.

The United States Court of Military Appeals agreed with the Court of Review, stating that ". . . the possibility of touching off a chain reaction that might come back to bite her [petitioner] is not the litmus test for self-incrimination." *United States v. Medley*, 33 M.J. 75, 77 (C.M.A 1991). Citing *California v. Byers*, *supra*, the Court of Military Appeals contended that:

We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate mal-

feasance cuts to the very core of military leadership and responsibility. It is a duty with respect to others that clearly exceeds the duty of ordinary citizens. *Cf.* R. Perkins and R. Boyce, *Criminal Law*, 742 (3d ed. 1982).

*United States v. Medley*, 33 M.J. 75, 77 (C.M.A. 1991). The court concluded that petitioner's noncommissioned officer status, therefore, provided a policy in favor of disclosure that overcame the infringement on petitioner's right to avoid compulsory self-incrimination.

That decision was clearly wrong—the violation of petitioner's constitutional right to avoid compulsory self-incrimination in this case was in no way overcome by petitioner's military status. The Air Force Court of Military Review recognized as much when it set aside the findings of guilty regarding the dereliction allegation relating to the times that petitioner actually used drugs with those whom she is accused of failing to report. A service member does not shed his or her rights under the Fifth Amendment when the uniform is donned. If the military felt that petitioner's conduct was inconsistent with leadership, the appropriate response would be to remove her from her leadership position. The application of a patently unconstitutional criminal sanction, however, should not be permitted to stand under these circumstances.

As the Court of Review noted, the government received an "unexpected boon" when the members found petitioner guilty of failing to report uses on divers occasions, but guilty of using cocaine on but a single occasion. Apparently, Additional Charge I and Additional Charge II were originally charged in the alternative, i.e., either petitioner used cocaine with her friends or she was derelict by failing to report their use. Had she been found guilty as charged, even the prosecution conceded that the dereliction offense



would have failed and the military judge so instructed. (R. 265-266). It is manifestly unfair to penalize petitioner for the clearly unintended consequences of a jury's vote to partially acquit the accused.

The jury's findings merely excepted the words "on divers occasions", without specifying any more exact time for the presumably single use of which they convicted. (R. 282; App. Exh. XIX). The evidence in the case does little to clarify which of the numerous uses attested to by the prosecution witnesses was intended. The court members could have been referring to an alleged use at the home of Ellis Lindsey in August, 1987. (R. 82). The court could have intended to convict of an alleged use at the Overtime Hotel in the "fall of 1987". (R. 150, 163, 195). Perhaps the jury believed petitioner used cocaine at her own home in November of 1987. (R. 199-201). Or the court members may have had some other occasion in mind. It is simply impossible to determine from the vague testimony adduced at trial and the ambiguous findings of the court members to what specific date the finding of guilty regarding Specification 2 under Additional Charge I was directed. It is, therefore, unclear that petitioner was not convicted of dereliction for failing to report a use to which she was a principal. *Heyward, supra*, at 38.

Petitioner does not argue that culpable involvement with another necessarily vitiates any obligation to reveal even wholly unrelated criminal conduct by that other person. The application of the *Heyward* rationale necessarily requires a balancing of society's interest in ferreting out criminal conduct and the individual's fundamental right to be free from compulsory self-incrimination. *Heyward, supra*, at 37. Where, as here, however, the conduct is so closely related in both time and nature, how can it be said that petitioner would be able to make disclosures with respect to one incident without subjecting herself to at

least the potential of incriminating herself with respect to the other incidents? See *United States v. Brunton*, 24 M.J. 566, 571 (N.M.C.M.R. 1987). The Court of Military Review recognized this necessary balancing when it disapproved the findings of guilt regarding the allegation of dereliction for failure to report individuals using marijuana while petitioner apparently used cocaine. The question is "where shall the line be drawn?" Petitioner respectfully submits that, while there is no "bright line" answer to that question, where, as here, there exists a real and appreciable risk that the required disclosure will result in self-incrimination, the line should fall on the side of protecting the individual's fundamental rights.

**CONCLUSION**

The petitioner's case is worthy of Supreme Court review. In particular, this case offers a unique opportunity to address the military's authority to suppress a service member's constitutional right to be free from compulsory self-incrimination. Petitioner respectfully requests that this Honorable Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL D. BURT

*Captain, Air Force Legal  
Services Agency*

*United States Air Force*

*AFLSA/JAJD*

*Bldg 5683*

*Bolling AFB, DC 20332-6128*

*(202) 767-1562*

*Counsel of Record*

JEFFREY R. OWENS

*Colonel, Air Force Legal  
Services Agency*

*United States Air Force*

*Counsel for Petitioner*

December 1991



**APPENDIX A**

**UNITED STATES AIR FORCE  
COURT OF MILITARY REVIEW**

---

**ACM 28012**

**UNITED STATES**

**v.**

**SERGEANT ROSEMARY M. MEDLEY, FR 230-94-5489  
UNITED STATES AIR FORCE**

---

Sentenced adjudged 6 July 1989 by GCM convened at Langley Air Force Base, Virginia. Military Judge: Michael C. Callinan.

Approved sentence: Bad conduct discharge, confinement for two (2) years, forfeiture of six hundred dollars (\$600.00) pay per month for two (2) years and reduction to airman basic.

Appellate Counsel for the Appellant: Mr. Ronald Douglas, Washington, D.C.; Colonel Richard F. O'Hair and Captain Michael D. Burt. Appellate Counsel for the United States: Colonel Joe R. Lamport, Colonel Robert E. Giovagnoni, Major Terry M. Petrie and Captain David G. Nix.

---

**Before**

**BLOMMERS, KASTL and MURDOCK  
Appellate Military Judges**

**(1a)**

## DECISION

KASTL, Senior Judge:

Sergeant Rosemary Medley was found guilty of dereliction of duty and wrongful use of cocaine, violations of Articles 92 and 112a, UCMJ, stemming from events occurring from July 1987 to January 1988. The Government alleged that the appellant: (a) used cocaine at various times with other military members; and (b) observed these fellow service personnel using drugs on other occasions but failed to report it.<sup>1</sup>

Sergeant Medley asserts in her brief and in oral argument before us that *United States v. Heyward*, 22 M.J. 35 (C.M.A 1986), bars her conviction for all the dereliction of duty offenses. We disagree.

*A Duty to Report Offenses and the "Heyward Exception"*

A

Personnel are required by regulation to report to proper authority the use of drugs by other service members. Despite this, the *Heyward* case provides one narrow exception based on self-incrimination grounds:

[W]e hold that where, at the time the duty to report arises, the witness to drug abuse is already an accessory or principal to the illegal activity that he fails to report, the privilege against compelled self-incrimination may excuse his non-compliance.

*Heyward*, 22 M.J. at 35.

---

<sup>1</sup> At trial, the parties stipulated that the duty to report the illegal use of drugs by military subordinates was imposed by Air Force Regulations 30-1, 30-2, and 39-2, as well as by a custom of the service.

The “*Heyward* exception” is of no benefit to this appellant. She was convicted of failing to report *only as to those occasions on which she herself did not use drugs*. In short, the *Heyward* exception is inoperative on the facts.

## B

The appellant, however, seeks to cobble together another type of *Heyward* defense. In essence, her theory is this: “For purposes of this appeal, you can postulate that I am involved in occasional drug use with these friends. Sometimes I do drugs with them, other times I socialize with them but don’t participate. Practically speaking it would be professional suicide for me to reveal any of their drug use—they will get even and tell about the times I *did* do drugs with them.”

In our judgment, the appellant’s argument is overcome by the *Heyward* rationale. In that case, Technical Sergeant Heyward used marijuana three times during a four-month period; *he also failed to report use by his companions on other occasions*. *Heyward*, 22 M.J. at 38. Anything which Sergeant Medley says in her behalf today could also be said for Technical Sergeant Heyward. Yet the Court of Military Appeals did not grant him relief on this basis. We find *Heyward* outcome-determinative. See also *United States v. Reed*, 24 M.J. 80 (C.M.A. 1987); *United States v. Thompson*, 22 M.J. 40 (C.M.A. 1986).

Neither can the appellant take comfort from *United States v. DuPree*, 24 M.J. 319 (C.M.A. 1987). That case involved a one time frolic by a guard; his prisoners’ marijuana use was inextricably intertwined with appellant’s misconduct in taking the prisoners off base, consuming alcohol with them, and failing to return them to jail on time. It was for this reason that his dereliction of duty conviction could not stand. *DuPree*, 24 M.J. at 321.

Perhaps the case offering the most hope to the appellant is *United States v. Brunton*, 24 M.J. 566, 571 (N.M.C.M.R. 1987). We find the case distinguishable on its facts; it involves co-conspirators operating in a narrow timeframe.

### C

Other *Heyward*-type questions exist in this case. The appellant was convicted in Charge II, specification 2 of dereliction of duty for failing to report the *marijuana* smoking of her subordinates. On these same occasions, as we read the record, she was herself using *cocaine*. We believe it draws the line too finely to deny an accused the "*Heyward* defense" when he or she is using Drug A and subordinates are using Drug B. In our judgment, the *Heyward* defense is available to the appellant at this juncture.<sup>2</sup> Accordingly, the findings of guilty as to Charge II, specification 2 cannot stand.

One more matter should be mentioned in this regard: The Government won an additional and unexpected boon when findings were announced in this case. Additional Charge I, specification 2 and Additional Charge II are offenses charged in the alternative—it was the Government's theory that either the appellant had used cocaine or been derelict in not reporting use by her subordinates. The first of these twinned specifications was charged as occurring on "divers occasion." At trial, the appellant was found guilty, but only after the words "divers occasions" were

---

<sup>2</sup> "[W]hile I should not dream of asking where the line can be drawn, since the great body of the law consists in drawing such lines, yet when you realize that you are dealing with a matter of degree you must realize that reasonable men may differ widely as to the place where the line should fall." Justice Oliver Wendell Holmes in *Schlesinger v. Wisconsin*, 270 U.S. 230, 241, 46 S.Ct. 260, 70 L.Ed. 557 (1926).



excepted by the voting members. In effect, this resulted in a finding of guilty on *one* occasion. A one-time cocaine use (Additional Charge I, specification 2) no longer stands as an alternative pleading, we believe, to divers failures to report (Additional Charge III). As a consequence, we believe that both findings may be sustained on the facts.

#### Other Matters

The case against the appellant was proved by the testimony of four witnesses. We are convinced that their evidence was more than sufficient for the members to find the appellant guilty of these matters. We, too, are convinced of her guilt.

The other assignments of error are resolved against the appellant. *United States v. Tyler*, 17 M.J. 381, 387 (C.M.A. 1984); *United States v. Everstone*, 26 M.J. 795 (A.F.C.M.R.) *pet. denied*, 27 M.J. 434 (C.M.A. 1988); *United States v. Rehberg*, 15 M.J. 691 (A.F.C.M.R.), *pet. denied*, 16 M.J. 185 (C.M.A. 1983).

The findings of guilty of Charge II, specification 2 are set aside. We shall reassess because of this matter and under our overall warrant to approve only so much of the findings and sentence as we find correct in fact and law.<sup>3</sup> Considering the record as a whole, we approve only so much of the sentence as extends to a bad conduct discharge, confinement for 14 months, forfeitures of \$600.00 per month for 14 months, and reduction to airman basic.

---

<sup>3</sup> The approved sentence, we note, reduced the length of confinement from the adjudged four years to two years, as well as reducing forfeitures to a similar two-year period.

The findings of guilty and the sentence, both as modified, are correct in law and fact and, on the basis of the entire record, are

AFFIRMED.

Senior Judge BLOMMERS and Judge MURDOCK concur.

OFFICIAL:

/s/ Mary V. Fillman

MARY V. FILLMAN

*Captain, USAF*

*Chief Commissioner*

**APPENDIX B**

**UNITED STATES COURT OF MILITARY APPEALS**

---

No. 64,801  
ACM 28012

UNITED STATES, APPELLEE

v.

ROSEMARY M. MEDLEY, SERGEANT  
U.S. AIR FORCE, APPELLANT

---

Argued January 10, 1991  
Decided September 4, 1991

---

Military Judge: Michael C. Callinan

---

**Counsel**

For Appellant: *Captain Michael D. Burt (argued); Lieutenant Colonel Jeffrey R. Owens (on brief); Colonel Richard F. O'Hair.*

For Appellee: *Captain Ann M. Mittermeyer (argued); Lieutenant Colonel Brenda J. Hollis and Captain David G. Nix (on brief); Colonel Robert E. Giovagnoni.*

### Opinion of the Court

Cox, Judge:

Appellant stands convicted, contrary to her pleas, of three specifications of wrongfully using cocaine and one specification of being derelict in her duty to report cocaine use by other servicemembers, in violation of Articles 112a and 92, Uniform Code of Military Justice, 10 USC §§ 912a and 892, respectively.<sup>1</sup>

The Government's evidence showed that appellant was present at a number of parties and social outings where illegal drugs were consumed. The military judge instructed the general court-martial members that appellant could not be convicted of failing to report her fellow servicemembers for any occasion on which she herself participated in the drug usage. *See United States v. Heyward*, 22 MJ 35 (CMA), *cert. denied*, 479 U.S. 1011 (1986);

---

<sup>1</sup> Appellant also was convicted on dereliction of duty by her failure to report marijuana use at one of the times and places she was convicted of cocaine use. Relying on our opinion in *United States v. Heyward*, 22 MJ 35 (CMA), *cert. denied*, 479 U.S. 1011 (1986), the Court of Military Review set aside that specification ruling that

it draws the line too finely to deny an accused that the "*Heyward* defense" when he or she is using Drug A and subordinates are using Drug B. In our judgment, the *Heyward* defense is available to the appellant at this juncture.

30 MJ 879, 881 (1990), *citing Schlesinger v. Wisconsin*, 270 U.S. 230, 241 (1926) (Holmes, J.).

The court-martial sentenced appellant to a bad-conduct discharge, confinement for 4 years, forfeiture of \$600 pay per month for 4 years, and reduction to Airman Basic. The convening authority reduced the confinement and forfeitures to 2 years each, but otherwise approved the sentence. The Court of Military Review, reassessing the sentence after dismissing one specification (see above), reduced the confinement and forfeitures to 14 months each, but affirmed the discharge and the reduction.

*United States v. Thompson*, 22 MJ 40 (CMA 1986). Concerning one of these drug events, the court-martial was convinced that she joined in using cocaine, so it acquitted her of the corresponding dereliction offense. Regarding another incident, the court-martial was satisfied that she was present, was aware of drug usage by the others but was not then using drugs herself, and failed to report the matter to proper authorities. Air Force Regulations 30-1, 30-2, and 39-6, as well as a custom of the service, require noncommissioned officers, among others, to report drug use that comes to their attention. *United States v. Medley*, 30 MJ 879, 880 n.1 (AFCMR 1990).

In *Heyward* and *Thompson*, we made it clear that a servicemember cannot be convicted of both using drugs and failing to apprehend or report others joining him *in the same drug usage*. We held this dual penalty would violate a servicemember's rights against compulsory self-incrimination. Art. 31, UCMJ, 10 USC § 831; and U.S. Const. amend. V. We recognized, however:

Due to contingencies of proof, *it may be warranted in some cases to charge an accused both with dereliction of duty for failure to report an offense and with the offense that he failed to report*. Nevertheless, we see no need to allow an accused to be convicted of both.

2 MJ at 37 (emphasis added).

Heyward, unlike appellant, was convicted of using illicit drugs and of failure to report others' use at the same time and place. We held:

The Government proved that on three occasions appellant was a principal to marijuana use by the same Air Force members that he failed to report. The Government also introduced evidence that appellant was present on two other occasions when marijuana

was used but he did not partake himself. *Thus appellant could properly be convicted of both use of marijuana on three occasions and dereliction of duty for failure to report drug use by others on the two occasions when he was not involved as a principal.*

22 MJ at 38 (emphasis added).

In effect, appellant now asks us to modify the *Heyward* rule and extend it to the instant facts. As she did before the Court of Military Review, she contends that the dereliction charge should be dismissed due to the social relationship among her co-actors. Her contention, essentially, is that the on-going drug activities of her social circle were so interrelated that it would have been impossible for her to report one incident without potentially incriminating herself with respect to the other incidents. *See United States v. Brunton*, 24 MJ 566 (NMCMR 1987).

From a practical standpoint, her argument has some logic. An acknowledgment, without more, of a friendly association with drug users *might* suggest to the Government a link between her and drugs.<sup>2</sup> Furthermore, denouncing the others' use of drugs could, under some circumstances, establish her ability to recognize cocaine, prejudicing a claim of innocent ingestion. *See United States v. Mance*, 26 MJ 244 (CMA) (knowledge of illicit nature of substance is element of offense), *cert. denied*, 38 U.S. 942 (1988).<sup>3</sup> Primarily, however, the logic of the argument is that appellant might expect retaliation from her "friends" if she betrayed them. Thus, given her obvious vulnerability, appellant had little real incentive to inform on her friends.

---

<sup>2</sup> It might equally suggest that she was a person who was willing to place duty above friendship.

<sup>3</sup> However, since appellant's use convictions were based on testimony that she "snorted" a "white, powdery substance," the innocent-ingestion defense, in 1987 A.D., is quite academic.

However, the possibility of touching off a chain reaction that might come back to bite her is not the litmus test for self-incrimination. Where a reporting requirement calls for "a compelled disclosure that has an incriminating potential," resolution of the issue depends on "str[ength of the] policies in favor of a disclosure called for by [the] statutes." *California v. Byers*, 402 U.S. 424, 427, 428 (1971) (plurality opinion). See *United States v. Heyward*, *supra* at 37 (fact that "the information disclosed may focus attention on the reporting servicemember and may eventually lead to criminal charges being brought against him . . . alone does not invalidate the reporting requirement"); cf. *United States v. Sievers*, 29 MJ 72 (CMA 1989).<sup>4</sup>

We must be careful in these cases not to overlook the military purpose of the duty to report drug offenses (or any offenses or negligent conduct, for that matter). Military leaders have a fundamental obligation to intervene and prevent criminal or negligent conduct. See RCM 302(b)(2), Manual for Courts-Martial, United

---

<sup>4</sup> Admittedly, the specifications as drafted were no models of clarity, spanning as they did lengthy and overlapping time frames. See *United States v. Reed*, 24 MJ 80, 83 (CMA 1987). The record of trial, however, reveals that each of the specifications of which appellant was convicted represented a different drug event, each at a different location. The defense was fully aware of which specification referenced which event, and there was no defense request for clarification. The court members were clearly apprised of both the nature of the allegations and the fact that appellant could not be convicted of failing to report drug offenses if she were a principal to that use. Thus, this case differs from *Reed* in two ways. First, unlike the military judge's providence inquiry in *Reed*, which convinced then-Judge Sullivan that the *Heyward* doctrine was "not satisfactorily resolve[d]", 24 MJ at 83, this case was litigated on the merits, and the members were properly instructed.

Second, the Air Force Regulation, unlike the Navy Regulation in *Reea*, is not unduly broad. *United States v. Reed*, *supra* at 83-86 (Everett, C.J., concurring). See *United States v. Heyward*, *supra*.

States, 1984. While we have expressed our reluctance to permit the criminal prosecution of servicemembers who fail to carry out the physical arrest or apprehension of other servicemembers, our concerns were based primarily on the lack of training, experience in law enforcement and definitive "notice" of what to do when, rather than on the proposition that there is no duty to act at all. *United States v. Thompson*, *supra* at 41; *see also United States v. Heyward*, *supra*, at 38, 39 (Everett, C.J., concurring).

We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility. It is a duty with respect to others that clearly exceeds the duty of ordinary citizens. *Cf. R. Perkins and R. Boyce, Criminal Law* 742 (3d ed. 1982).

Thus, under the framework of *California v. Byers*, *supra*, we have no hesitation in validating appellant's duty to report her subordinates' criminal conduct, notwithstanding the fact that she was found to have joined them in crime on other occasions.<sup>3</sup> The policy basis for reporting misconduct in the military is more than powerful; it is axiomatic. On these facts, and in view of the adroit handling of the instructions by the military judge, we agree with the Court of Military Review, when it said:

The "*Heyward* exception" is of no benefit to this appellant. She was convicted of failing to report *only*

---

<sup>3</sup> We have not had occasion to decide whether, in the event the Government elects to prosecute a servicemember for offenses discovered subsequent to his obligatory report on others, "the Government's burden [would be] heavy in showing that the evidence later provided" against the accused was "not the product of" his report on others. *See United States v. Boyd*, 27 MJ 82, 86 (CMA 1988) (Everett, C.J., concurring). In the instant case, of course, appellant did not report on the others, so we are not confronted with this question.



*as to those occasions on which she herself did not use drugs.* In short, the *Heyward* exception is inoperative on the facts.

30 MJ at 880.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN concurs.

---

EVERETT, Senior Judge (concurring):

The regulatory requirement of the various military departments that purports to place on *all* personnel the duty to report to higher authority any and all incidents of drug use by fellow servicemembers is troubling to me. For this reason, I wrote separately in *United States Heyward*, 22 MJ 35, 38 (CMA), *cert. denied*, 479 U.S. 1011 (1986), and later in *United States v. Reed*, 24 MJ 80, 83 (CMA 1987), in order to make clear my analysis of this alleged duty. I do so again here.

Air Force Regulation (AFR) 30-1, Personnel, Air Force Standards (4 May 1983), claims to impose a blanket drug-use reporting duty on all Air Force personnel. Paragraph 10b charges every airman, "You are responsible for (1) reporting all known or suspected incidents of drug abuse by others and (2) encouraging persons known to you to have an existing or potential drug abuse problem to seek assistance through the Air Force Rehabilitation Program." See para. 3-17, AFR 30-2 (18 April 1986). In regard to what offenses must be reported, this provision is more focused than the language of Article 1139 of U.S. Navy Regulations (1973) that was at issue in *Reed*. Thus, arguably it provides the constitutionally mandated notice that was missing there. See 24 MJ at 84 (Everett, C.J., concurring). Nonetheless, to me, it remains suspect in

terms of notice because—as I discussed both in *Heyward* and in *Reed*—to the extent the reporting requirement would apply to even the lowest ranking member of the Air Force, it deviates greatly from the expectations of citizens generally at common law and in virtually all state jurisdictions.

Furthermore, again to the extent that this blanket regulatory provision purports to burden even the lowest ranking member of the service, I conclude that the “‘police state’” connotations of such an obligation render the provision too broad even considering “the interests of military necessity.” See *United States v. Reed*, *supra* at 85.

Appellant, however, is *not* “the lowest ranking member of the” Air Force; she is a sergeant—a noncommissioned officer. As I implied in *Heyward* and in *Reed*, I believe that the military can expect its leadership, both commissioned and noncommissioned officers, to meet a higher level of responsibility than can logically or legally be imposed on the military’s citizenry at large.

Moreover, at her court-martial, appellant stipulated to the following:

As a noncommissioned officer, the accused had a certain prescribed duty, that is, to report to proper military authorities the wrongful use of illegal drugs by persons subordinate in rank to the accused, and known to her to be members of the United States Air Force.

Thus, not only did “the Government . . . prove that the Air Force intended that appellant, as a noncommissioned officer, have a duty to report drug use by others,” but it also proved “that appellant knew . . . that [s]he was subject to this duty.” See *United States v. Heyward*, *supra* at 38 (Everett, C.J., concurring).

Accordingly, because appellant was part of the Air Force's leadership corps and because she knew that, as part of that corps, she had a duty to report to higher authority any drug use by others, I join the majority's opinion here.

(2)  
No. 91-851

Supreme Court U.S.  
FILED

FEB 26 1992

OFFICE OF THE CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1991

---

ROSEMARY M. MEDLEY, PETITIONER

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF MILITARY APPEALS

---

BRIEF FOR THE UNITED STATES  
IN OPPOSITION

---

KENNETH W. STARR  
*Solicitor General*  
*Department of Justice*  
*Washington, D.C. 20530*  
*(202) 514-2217*

BRENDA J. HOLLIS  
*Lt. Col., AFLSA, USAF*

THOMAS E. WAND  
*Capt., AFLSA, USAF*  
*Appellate Government Counsel*  
*Government Trial and*  
*Appellate Counsel Division*  
*Air Force Legal Services Agency*  
*Bolling Air Force Base*  
*Washington, D.C. 20332-6128*

---

---

### **QUESTION PRESENTED**

Whether convicting petitioner for failing to report to military authorities the drug use of other service-members violated her Fifth Amendment privilege against compelled self-incrimination.



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	2
Argument .....	7
Conclusion .....	15

## TABLE OF AUTHORITIES

### Cases:

<i>Albertson v. Subversive Activities Control Board</i> , 382 U.S. 70 (1965) .....	11, 12
<i>California v. Byers</i> , 402 U.S. 424 (1971) .....	6, 8, 9, 10, 12, 13
<i>Grosso v. United States</i> , 390 U.S. 62 (1968) .....	11, 12
<i>Marchetti v. United States</i> , 390 U.S. 39 (1968) .....	11, 12
<i>Murray v. Haldeman</i> , 16 M.J. 74 (C.M.A. 1983) .....	3, 10
<i>Schlesinger v. Councilman</i> , 420 U.S. 738 (1975) .....	9
<i>United States v. Heyward</i> , 22 M.J. 35 (C.M.A.), cert denied, 479 U.S. 1011 (1986) .....	3, 7, 10, 12, 13
<i>United States v. Sullivan</i> , 274 U.S. 259 (1927) .....	10, 11
<i>United States v. Thompson</i> , 22 M.J. 40 (C.M.A. 1986) .....	3
<i>United States ex rel. Toth v. Quarles</i> , 350 U.S. 11 (1955) .....	9

### Constitution, statutes, and regulation:

U.S. Const. Amend. V .....	6, 7, 8, 11, 13
Uniform Code of Military Justice, 10 U.S.C. 801 <i>et seq.</i> :	
Art. 66(c), 10 U.S.C. 866(c) .....	14
Art. 92, 10 U.S.C. 892 .....	2
Art. 92(3), 10 U.S.C. 892(3) .....	3
Art. 112a, 10 U.S.C. 912a .....	2, 3
Air Force Reg. 30-1 (May 4, 1983) .....	2, 7

# IV

Miscellaneous:	Page
<i>Manual for Courts-Martial, United States, App. 12,</i> Maximum Punishment Chart (1984) .....	7
Note, <i>Forcing the Bystander to Get Involved: A</i> <i>Case for a Statute Requiring Witnesses to Re-</i> <i>port Crime</i> , 94 Yale L.J. 1787 (1985) .....	13



# **In the Supreme Court of the United States**

OCTOBER TERM, 1991

---

No. 91-851

ROSEMARY M. MEDLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF MILITARY APPEALS*

---

## **BRIEF FOR THE UNITED STATES IN OPPOSITION**

---

### **OPINIONS BELOW**

The opinion of the Court of Military Appeals, Pet. App. 7a-15a, is reported at 33 M.J. 75. The opinion of the Air Force Court of Military Review, Pet. App. 1a-6a, is reported at 30 M.J. 879.

### **JURISDICTION**

The judgment of the Court of Military Appeals was entered on September 4, 1991. The petition for a writ of certiorari was filed on December 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

## STATEMENT

Following a general court-martial at Langley Air Force Base in Virginia, petitioner, a member of the United States Air Force, was convicted on three counts of the wrongful use of cocaine, and on two counts of dereliction of duty for failing to report marijuana and cocaine use by subordinate Air Force members, in violation of Articles 112a and 92 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a and 892. She was sentenced to four years' confinement, a bad-conduct discharge, forfeiture of \$600 of pay per month for four years, and a reduction in rank to the lowest enlisted grade. The convening authority reduced petitioner's term of imprisonment and the period of her forfeitures to two years, but otherwise affirmed the findings and sentence. The Air Force Court of Military Review set aside petitioner's conviction of dereliction of duty for failure to report marijuana use by subordinate Air Force members and reduced petitioner's period of confinement and forfeiture to 14 months, but otherwise affirmed the findings and sentence as approved by the convening authority. The Court of Military Appeals granted discretionary review and affirmed.

1. Air Force noncommissioned officers have a duty to report illegal drug use by subordinate servicemembers to appropriate military authorities. The relevant regulation states that every airman is "responsible for \* \* \* reporting known or suspected incidents of drug abuse by others." Air Force Reg. 30-1 (May 4, 1983). Pet. 2 (parties stipulated that "Air Force Regulations impose an affirmative obligation on noncommissioned officers to disclose" knowledge of illegal drug use by other servicemembers); PX 1. The Air Force imposes this duty on noncommissioned officers

because drug use impairs servicemembers' readiness and ability to perform their military functions, see *Murray v. Haldeman*, 16 M.J. 74, 79 (C.M.A. 1983), and because noncommissioned officers "have a fundamental obligation to intervene and prevent criminal or negligent conduct." Pet. App. 11a.

2. Petitioner was an Air Force noncommissioned officer and knew her duty in this regard. PX 1; Pet. App. 14a (Everett, J., concurring). Nevertheless, over a period of approximately six months, petitioner attended numerous social gatherings at which subordinate Air Force members used cocaine and marijuana in her presence. On some, but not all, of those occasions, petitioner used cocaine. Pet. App. 8a-9a. Petitioner never reported any of those incidents to the appropriate military authorities.

Petitioner was charged with dereliction of duty for failing to report the cocaine and marijuana use of other servicemembers, in violation of Air Force regulation and Article 92(3) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 892(3), and the wrongful use of cocaine, in violation of UCMJ Article 112a, 10 U.S.C. 912a. Pet. App. 2a, 8a. Several charges were "paired" or pleaded in the alternative so that for each instance of misconduct, petitioner could be convicted of either dereliction of duty for failing to report the drug use of other servicemembers, or for using drugs herself, but not for both charges. See Tr. 265. The charges were so framed because controlling military case law holds that, where the officer participated in drug use along with others, the officer may be convicted of the drug use, but not of dereliction of duty for failing to report the use by others. *United States v. Heyward*, 22 M.J. 35 (C.M.A.), cert. denied, 479 U.S. 1011 (1986); *United*

*States v. Thompson*, 22 M.J. 40 (C.M.A. 1986). This principle has become known in military law as the *Heyward* exception.

The trial judge instructed the court-martial panel about the *Heyward* exception, explaining that petitioner "could not be convicted of failing to report her fellow servicemembers for any occasion on which she herself participated in the drug usage." Pet. App. 8a; see Tr. 265 ("I advise you the accused may not be convicted of failing to report illegal drug use by others if the accused at the same time was also using illegal drugs. \* \* \* You may not find [petitioner] guilty of both the wrongful use of cocaine and dereliction of duty for not reporting use by others on the same occasion.").

Two of the charges, Additional Charges I and II, covered a time frame in which more than one occasion of drug use or observance occurred. Additional Charge I alleged that petitioner had used cocaine on "divers occasions," and Additional Charge II that she had failed to report the cocaine use of other servicemembers, also on "divers occasions." Tr. 265; I.O. Exh. 1. Since petitioner might have used cocaine with fellow servicemembers on one of those "divers occasions" and merely observed it on another, the court-martial panel was instructed that petitioner could be convicted for both the cocaine use alleged in Additional Charge I and the failure to report the drug use of others alleged in Additional Charge II. Tr. 265. The panel was cautioned, however, that it could convict petitioner on both charges only if the instances were distinct; in other words, she could be convicted on both charges only if she were guilty of drug "use on one of these occasions, and guilty of dereliction on the other occasion." *Ibid.*

Petitioner was convicted of three instances of cocaine use and two instances of dereliction of duty. With respect to Additional Charge I, the panel found that she had used cocaine as specified, but not "on divers occasions." Tr. 282. By that, the panel meant that petitioner was found guilty of using cocaine only once during the period covered by that charge. See Tr. 265. The court-martial panel also found that petitioner had failed to report cocaine use by other Air Force members on other "divers occasions," as alleged in Additional Charge II. Tr. 282. See also AX 19 (verdict worksheet).

3. The Air Force Court of Military Review affirmed petitioner's convictions for cocaine use and one of her convictions for dereliction of duty. Pet. App. 1a-6a. The court, however, vacated her other conviction for dereliction of duty, relying on the *Heyward* rule that a servicemember may not be convicted of failing to report an incident of drug use by others if he or she was also using drugs on that occasion. Pet. App. 4a. At the same time, the court rejected her challenge to her conviction for dereliction of duty under Additional Charge II, the subject of the certiorari petition. Petitioner, the court recognized, had engaged in illegal drug use with the same individuals whom she was required to report. *Id.* at 3a. Nonetheless, since the incident of cocaine use for which she was convicted under Additional Charge I was distinct from the incident of failure to report the drug use of others charged in Additional Charge II, Pet. App. 4a-5a, the *Heyward* exception did not apply to Additional Charges I and II. That exception excuses only the failure to report the drug use of others on occasions on which the servicemember actually participates in the drug use; it does not excuse

failure to report all individuals with whom the servicemember has used drugs on other occasions. *Id.* at 3a-4a. The court reduced petitioner's confinement and forfeiture to 14 months, but it affirmed petitioner's discharge and reduction in rank. *Id.* at 5a.

4. The Court of Military Appeals granted discretionary review and affirmed. Pet. App. 7a-15a. Petitioner argued there, as she does here, that requiring her to report drug use by individuals with whom she had used drugs on other occasions violated her Fifth Amendment privilege against compulsory self-incrimination. Petitioner's contention, the court noted, "is that the ongoing drug activities of her social circle were so interrelated that it would have been impossible for her to report one incident without potentially incriminating herself with respect to the other incidents." Pet. App. 10a. The court thus turned to the framework adopted by the plurality in *California v. Byers*, 402 U.S. 424 (1971), and balanced the strength "of the policies in favor of a disclosure" against petitioner's interest in avoiding self-incrimination. Pet. App. 11a.

Military leaders, the court explained, have a "fundamental obligation to intervene and prevent criminal and negligent conduct." Pet. App. 11a. Ignoring the "blatant criminal conduct of subordinates," the court reasoned, is inconsistent with that obligation: "This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility." Pet. App. 12a. Because the policy behind the reporting requirement was "more than powerful," indeed, "axiomatic," the court had "no hesitation" in upholding petitioner's duty to report "her subordinates' criminal conduct, notwithstanding the fact that she was found to have joined them in crime on other occasions." *Ibid.*



## ARGUMENT

Petitioner does not challenge her convictions for using cocaine; she concedes, as she must, that the Air Force may punish her for her illegal use of controlled substances. Instead, she claims only that her conviction for dereliction of duty runs afoul of the Fifth Amendment.<sup>1</sup>

1. Air Force regulations do not require servicemembers to report their own illegal drug use; they require only that servicemembers report incidents of drug use by other servicemembers. Air Force Reg. 30-1 (May 4, 1983); Pet. 2; PX 1; *United States v. Heyward*, 22 M.J. at 37. Since the Fifth Amendment prohibits only compelled *self*-incrimination—not the compelled incrimination of others—the regulations are entirely constitutional.

---

<sup>1</sup> It is possible that petitioner's sentence would be unaffected by reversal of her conviction for dereliction of duty. For example, in *United States v. Heyward*, 22 M.J. 689 (A.F.C.M.R. 1986), just that happened. Even though the Court of Military Appeals set aside certain findings of guilt on a charge of failing to report the marijuana use of other servicemembers, on remand the court of military review found the original sentence appropriate based on the charges which were affirmed. There is good reason to believe that would occur here too. The maximum punishment for petitioner's cocaine convictions is a dishonorable discharge, 15 years' confinement, total forfeiture of pay for 15 years, and reduction to the lowest rank. The maximum punishment for the contested dereliction of duty offense, on the other hand, is only a bad conduct discharge, six months' confinement, forfeiture of pay for six months, and reduction to the lowest rank. *Manual for Courts-Martial, United States*, App. 12, Maximum Punishment Chart (1984). Because of this disparity, reversal of the lesser charge of dereliction of duty is unlikely to materially affect petitioner's sentence.

Petitioner argues that disclosure of her subordinates' drug use could have "touch[ed] off a chain reaction," Pet. App. 11a, that might ultimately have led to information that would incriminate her. She argues that if she had reported the drug use of her subordinates, her report would have focused the attention of military authorities on her subordinates who had seen her use drugs on other occasions and who might have revealed her activities to the authorities.

While the scenario petitioner constructs is not wholly fanciful, the possibility that such a hypothetical sequence of events could take place does not render the Air Force's reporting requirements unconstitutional. On the contrary, "[i]n order to invoke the privilege it is necessary to show that the compelled disclosures will *themselves* confront the claimant with 'substantial hazards of self-incrimination.'" *Byers*, 402 U.S. at 429 (plurality opinion) (emphasis added). That is not true here. The required disclosures would not themselves have incriminated petitioner, as there is nothing illegal about "know[ing] or suspect[ing]" the drug use of others.

In light of the *Heyward* rule, servicemembers are not required to report incidents of drug use by others if they also participated in the drug use. As a result of that rule, any disclosure compelled by the regulation is one that, by definition, does not implicate the reporting servicemember; any incident of drug use in which she did participate is exempt from disclosure. Accordingly, the requirement is consistent with the Fifth Amendment privilege, as it is "facially neutral" and neither requires nor implies any "admission of criminal activity by the declarant." *Heyward*, 22 M.J. at 37.



2. In any event, the possibility that the “[i]nformation revealed” might “be ‘a link in the chain’ of evidence leading to prosecution and conviction,” will not alone invalidate a reporting requirement. *Byers*, 402 U.S. at 427-428 (plurality opinion). Instead, the courts must balance the “public need [for disclosure] on the one hand, and the individual claim to constitutional protections on the other.” *Id.* at 427. The Court of Military Appeals did precisely that here, correctly concluding that the balance tips decisively in favor of the reporting requirement.

a. The strength of the policy behind the Air Force’s reporting requirement is best determined by looking at the function of the Armed Services in our society, the impact drug abuse could have on that function, and the need for members of the military to assume special duties. As this Court has recognized:

To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past.

*Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975). The military’s “primary business” is, of course, “to fight or be ready to fight wars should the occasion arise.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). It goes without saying that illicit drug use interferes with that business. Drug abuse impairs the ability of drug-using servicemembers to fulfill their military mission. It also places all servicemembers, drug-abusing or drug-free, in danger, since a weapon or other dangerous instrumentality in the hands of a drug-impaired servicemember imperils not just the drug-abuser but anyone

with the misfortune of being nearby. For that reason, drug abuse in the military has long been regarded as presenting "a special threat to the performance of the mission entrusted by the Constitution and Congress to the Armed Services." *Murray*, 16 M.J. at 79. To combat that threat and to "maintain high standards of health, morale, and fitness for duty," the Air Force is justified in imposing "upon its members a special duty to report drug abuse." *Heyward*, 22 M.J. at 36.

This justification is even stronger where, as here, the duty in question is imposed on a person in a leadership position. Military leaders are expected to maintain the discipline, morale and fitness of their subordinates.<sup>2</sup> The military's interest in requiring military leaders to report drug use by subordinates is far weightier than the interest in *Byers* in obtaining names and addresses of drivers who are involved in automobile accidents to ensure financial accountability.

b. Petitioner's interest in avoiding self-incrimination cannot outweigh the military's need for disclosure. Indeed, the risk of incrimination presented by the Air Force's reporting requirement is far less compelling than risks created by disclosure requirements this Court has upheld in the past. *United States v. Sullivan*, 274 U.S. 259 (1927) (disclosure of illegally derived income); *Byers*, 402 U.S. at 424

---

<sup>2</sup> As the Court of Military Appeals explained, Pet. App. 12a:

We have never intimated that it is lawful or excusable for a person in a position of military leadership to consciously ignore the blatant criminal conduct of subordinates. This classic duty not to tolerate malfeasance cuts to the very core of military leadership and responsibility. It is a duty with respect to others that clearly exceeds the duty of ordinary citizens.

(disclosure of name and address of person involved in accident). In *Sullivan*, for example, the defendant was prosecuted for failing to file a tax return. He claimed that requiring him to file a return violated the Fifth Amendment because it would reveal or suggest that he had an unlawful source of income, proceeds from sales of bootleg liquor. This Court flatly rejected his claim as pressing "the protection of the Fifth Amendment \* \* \* too far." *Sullivan*, 274 U.S. at 263.

The income reporting requirement in *Sullivan* did create some direct risk of self-incrimination: by filing the required return, the taxpayer would have drawn attention to himself and provided evidence (albeit circumstantial) of his own wrongdoing in the form of the disclosure that he had income with no reported source. By contrast, petitioner's compliance with the reporting requirement would have focused attention not on her conduct, but on that of other servicemembers. The disclosure itself would not have revealed any wrongdoing on her part, as awareness of the drug use of others is not a crime. Thus, petitioner's claim is even more attenuated than the claim this Court rejected as "an extreme if not an extravagant application of the Fifth Amendment" in *Sullivan*. 274 U.S. at 263-264.

3. Petitioner invokes this Court's holdings in *Albertson v. Subversive Activities Control Board*, 382 U.S. 70 (1965); *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968). Pet. 4-5. Those cases, however, differ from this one in three critical respects.

First, in each of those cases, the challenged law required the individual to report his own illegal activities, which created a real, appreciable, and direct

risk of self-incrimination.<sup>3</sup> By contrast, the regulation here did not require petitioner to report or admit her own misconduct; it required her to report the illegal acts of others, and even then only in instances in which she did not participate in that illegal conduct.

Second, “[i]n all of th[o]se cases the disclosures condemned were \* \* \* extracted from a ‘highly selective group inherently suspect of criminal activities.’” *Byers*, 402 U.S. at 430 (plurality opinion) (quoting *Albertson*, 382 U.S. at 79); see *Marchetti*, 390 U.S. at 47 (those engaged in wagering are a group “inherently suspect of criminal activities.”); *Grosso*, 390 U.S. at 64 (petitioner “inherently suspect of criminal activities.”). By contrast, in this case there is nothing suspect about the group from which the disclosure is required; rather, the duty is incumbent upon all servicemembers. *Heyward*, 22 M.J. at 37.<sup>4</sup> Compare *Byers*, 402 U.S. at 430-431 (plurality opinion) (group of all automobile drivers neither “highly selective” nor “inherently suspect of criminal activities.”).<sup>5</sup>

---

<sup>3</sup> In *Albertson*, the individuals were required to admit membership in the Communist Party, which was, at that time, prohibited under two federal statutes. 382 U.S. at 77. In *Marchetti* and *Grosso*, bookmakers were required to pay a wagering excise tax, even though gambling was illegal under both federal law and the law of most States. 390 U.S. at 44.

<sup>4</sup> One judge of the Court of Military Appeals has questioned the applicability of the reporting requirement to the lowest ranking members of the Air Force, based on lack of notice. Pet. App. 13a-14a. But notice is not an issue here. Petitioner was not a low-ranking airman but a noncommissioned officer and part of the leadership corps; she was well aware of her duty. Pet. App. 13a-15a.

<sup>5</sup> It may be argued that, even though the duty runs against all servicemembers, it operates only against those who have

Third, *Marchetti, Albertson, and Grosso* did not arise in a military context. Historically, the common law has been reluctant to impose affirmative duties on citizens, whether it be to report crimes or otherwise. See Note, *Forcing the Bystander to Get Involved: A Case for a Statute Requiring Witnesses to Report Crime*, 94 Yale L. J. 1787 (1985). But the tradition in the military is different. Military leaders, in particular, have long been expected to assume special responsibilities with respect to others that “clearly exceed[] the duty of ordinary citizens.” Pet. App. 12a. See Pet. App. 14a (Everett, J., concurring). The duty not to tolerate criminal conduct that undermines military readiness and discipline is one such responsibility. Pet. App. 12a. Petitioner knew of her responsibilities in this respect, but she failed to fulfill her duty nonetheless. Nothing in the Fifth Amendment prohibits the Air Force from prosecuting her for that dereliction of duty.

4. Finally, petitioner suggests that she was convicted of failing to report the drug use of others on an occasion when she, too, was using drugs. Pet. 9. That claim is both fact-bound and meritless. As explained above, petitioner was convicted of dereliction of duty under Additional Charge II for an incident

---

something to report, *i.e.*, those who know or suspect the drug use of others. But there is nothing inherently illegal or suspect about having knowledge or suspicion of drug abuse by others, either. See *Byers*, 402 U.S. at 431 (plurality opinion) (even though only drivers involved in accidents are required to leave their names and addresses, the disclosure statute did not violate the Fifth Amendment because it is not a criminal offense to be involved in an accident). Furthermore, military case law exempts from disclosure those incidents that might be suspect—incidents in which the servicemember participated in the drug use. *Heyward*, 22 M.J. at 37.

of drug use distinct from those underlying her conviction for cocaine use under Additional Charge I. Pages 4-5, *supra*. As the Court of Military Appeals stated, Pet. App. 11a n.4:

The record of trial, however, reveals that each of the specifications of which [petitioner] was convicted represented a different drug event, each at a different location. The defense was fully aware of which specification referenced which event, and there was no defense request for clarification. The court members were clearly apprised of both the nature of the allegations and the fact that [petitioner] could not be convicted of failing to report drug offenses if she were a principal to that use.

The Air Force Court of Military Review was of the same view: “[Petitioner] was convicted of failing to report only as to those occasions on which she herself did not use drugs.” Pet. App. 3a (emphasis omitted).<sup>6</sup> Accordingly, further review in this Court is unwarranted.<sup>7</sup>

---

<sup>6</sup> This finding must be respected unless no reasonable trier of fact could conclude otherwise, since the courts of military review have independent fact-finding authority under Article 66(c) of the UCMJ, 10 U.S.C. 866(c).

<sup>7</sup> Petitioner also appears to argue that convicting her of dereliction of duty under Additional Charge II after acquitting her of cocaine use for the same incident (but not others) under Additional Charge I is “manifestly unfair.” Pet. 8-9. We fail to see the unfairness. Petitioner cites no precedent or rule of procedure that suggests an indictment may not be structured so that acquittal on one charge clears the way to conviction on another. For example, where a defendant is charged with manslaughter and murder arising from the same homicide, the jury is often instructed that it may convict him of manslaughter only if it acquits him of the murder charge. Similarly here, the court-martial panel found defendant guilty



CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR  
*Solicitor General*

BRENDA J. HOLLIS  
*Lt. Col., AFLSA, USAF*

THOMAS E. WAND  
*Capt., AFLSA, USAF*  
*Appellate Government Counsel*  
*Government Trial and*  
*Appellate Counsel Division*  
*Air Force Legal Services Agency*  
*Bolling Air Force Base*

FEBRUARY 1992

---

of dereliction of duty as to a certain incident only after finding petitioner not guilty of using cocaine in that same incident.